FINAL SYNOPSIS

Title of the Research Topic:

CONSTITUTIONAL COMPULSIONS AND THE MARITIME LAWS OF IRAQ AND INDIA: A COMPARATIVE CRITIQUE

A. INTRODUCTION:

The seas, it is said, have historically performed two vital functions: *first*, "as a medium of communication and *second* as a vast reservoir of resources both living and non-living"[1]. This resulted in the development of legal fabric. The "Maritime Law", also known as the "Admiralty Law", is a complex area in the discipline of law which dates back to antiquity. It is an ancient legal system derived from the customs of the early Egyptians, Phoenicians and Greeks who were involved extensively in commerce in the Mediterranean Sea[2]. As the commerce moved northward and westward *Sea Codes* developed in northern European ports. The *Laws of Wisby*, *the Laws of Hansa Towns and the Laws of Oleron* were the important medieval *Sea Codes* which have been termed as the three arches upon which rests modern admiralty world over .[3] However, the earliest code is developed by the islands of Rhodes. In England, admiralty Courts were functioning since 14th century where as in 1789, the United States Constitution extended federal judicial power to all cases of maritime jurisdiction.

Admiralty, or maritime law, consists of the rules and principles derived from custom, judicial decisions, legislative enactments and international treaties that govern the legal relationships arising from the transportation of passengers and cargoes on the high seas and other navigable waters. Appropriate tribunals

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[1] Quoted in, Malcom N. Shaw, *International Law* 490, 5th edn., United Kingdom: Cambridge University Press, 2005.

[2] *http//www.mor.legal.com/law.hmlt*, [accessed on 12-07-2009].

[3] *Ibid*.

have been put in place to apply maritime law in matters involving maritime contracts, maritime torts and other maritime offences.

India and Iraq have a coastline of 7,517 km and 58km respectively[4]. The coastal environment plays a vital role in both India and Iraq's economy by virtue of the resources, productive habitats, and rich biodiversity. The Coastline of Indian mainland is surrounded by Arabian Sea in the west, Bay of Bengal in the east, and Indian Ocean in the south[5] while Arabian Sea surrounds the coastline of Iraq in the south. For import and export of goods through waters is comparatively cheaper which facilitates the country to provide the imported consumables to its citizenry at a competitive price. Moreover, the ever increasing recreational boating activities such as cruising, fishing, racing and yachting has become as widespread as to require Government regulation in all its forms. Maritime transactions are also posing environmental challenges by polluting the waters. Therefore maritime laws need to be all inclusive *inter alia*, in Iraq and India.

B. STATEMENT OF THE RESEARCH PROBLEM:

For governing maritime business activities and to build up international relations, both India and Iraq have enacted several legislations. However, the question that haunts the researcher is whether these laws are fulfilling the objectives for which they have been enacted.

Islamic law also made major contributions to international admiralty law, departing from the previous Roman and Byzantine maritime laws in several ways. These included muslim sailors being "paid a fixed wage "in advance" with an understanding that they would owe money in the event of desertion or malfeasance, in keeping with Islamic Conventions" in which contracts should

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[4] "Geography of India",
http://en.wikipedia.org/wiki/Geography_of_India;
"Iraq", http://www.nationsencyclopedia.com/geography/Indonesia-to-Mongolia/Iraq.html, [accessed on 01-07-2013].

[5] "Length of Coastline of India", *http://www.thecolorsofindia.com/interesting-facts/geography/length-of-coastline-of-india.html*, [accessed on 01/07/2013].

specify “a known fee for a known duration”, in contrast to Roman and Byzantine sailors who were "stakeholders in a maritime venture, in as much as captain and crew, with few exceptions, were paid proportional divisions of a sea venture’s profit, with shares allotted by rank, only after a voyage’s successful conclusion." Muslim jurists also distinguished between "coastal navigation, or *cabotage*," and voyages on the “high seas”, and they also made shippers "liable for freight in most cases except the seizure of both a ship and its cargo." Islamic law also "departed from Justinian’s *Digest* and the *Nomos Rhodion Nautikos* in condemning slave jettison", and the Islamic *Qirad* was also a precursor to the European *commenda* limited partnership. The “Islamic influence on the development of an international law of the sea” can thus be discerned alongside that of the Roman influence[6]. Thus, whether the Islamic law especially in Iraq still influences development of maritime laws in Iraq in the contemporary period is another gargantuan issue that needs to be addressed through this doctoral research.

Like any other law, maritime law has its own terminology. In almost every enactment relating to business and other activities through international waters both in Iraq and India, several terms have been incorporated. However, there is need for reconsidering some of the terms for which research is needed.

On the one hand, it is ironical to state that Iraq has only a few enactments on maritime. These laws according to the researcher are craving for serious reconsideration. Even though the country heavily relies upon imports for the necessities of the citizenry through water ways, there is least concern to address the lacunae in the existing laws. Probably, this may be due to political turmoil. On the other, most of the Indian maritime laws are archaic as they have been enacted during colonial period. Whatever amendments till date have been worked out are of little consequence. It is a tough task to find out ways and

[6] *Ibid.*

means to modify the existing legal framework in both India and Iraq to take the maritime law up to the expected standards in the International Conventions and Recommendations.

Contemporary Maritime Law is a mixture of ancient doctrines and new laws both national and international. Among the traditional principles of admiralty still in use are marine insurance, general average and salvage. The welfare of the seaman, the ancient concept of "maintenance and cure" is also still in use today. The reason for the continuation in the use of ancient principles of law is that the basic hazards of seafaring have not changed. In the last decades, however, naval architecture and cargo handling have changed in significant ways. The extensive use of crude oil carriers as well as carriers of liquefied natural gas has posed new hazards and questions of liability for oil pollution and damage to the marine ecology and the shorelines. Accidents such as the Amoco Cadiz in 1978 and the Exxon Valdez have gone a long way towards the creation of a strong ecological awareness and a new body of laws and Court opinions[7]. The question therefore is what are measures the Governments of Iraq and India have taken to address this problem? These need to be pointed out through this research.

The principal parties affected by the law of admiralty are the crew, the ship-owner, the cargo owner, the chartered and the marine insurer. Among matters which fall within the admiralty jurisdiction are suits arising from collisions at sea, salvage claims and, increasingly, from marine pollution. The bulk of maritime law, however, secreted in the interstices of business practice, mostly exists to deal with legal problems arising within the sea transport industry[8]. Whether there are concrete provisions in the area of maritime law that facilitates quick settlement of matters affecting the crew, the ship-owner, the

[7] *Supra* note 1.
[8] Agrawal H.O, *International Law and Human Rights* 123-155, 15th edn., Allahabad: Central Law Publications, 2008 (*Passim).*

cargo owner, the chartered and the marine insurer both in India and Iraq and whether there are candid provisions to address the issue of jurisdiction are other issues which the researcher will undertake in this doctoral research.

Being a classic discipline, maritime law has been considered as the only true body of International Law, a *lingua franca* through which people of different nations can come together to deal with the promise, profits and perils of voyages at sea. It also includes some of the economic and environmental challenges of the late twentieth century. In addition to traditional commercial topics, admiralty can be said to include the laws which regulate the ever increasing recreational boating activities such as cruising, fishing and racing. Once an elitist sport and lifestyle, yachting has become as widespread as to require Government regulation in all its forms[9]. The law relating to the seas, thus, has been in a state of flux requiring in depth research for proper understanding through this research.

C. SIGNIFICANCE OF THE RESEARCH PROBLEM:

There have been momentous changes in the law of the sea for the last fifty years. An almost settled branch of international law has been reopened in response to the needs of the international community to appropriate limitless resources of the sea for common good of mankind.

Although the importance of sea as a means of communication has lessened in recent years, new scientific and technological developments have brought to the fore the need of devising an equitable system for the distribution of vast living and non-living resources of the sea. The problems of conservation of vast living and non-living resources are complex. States have been using the sea rather recklessly with the result that there is the danger of pollution and consequent loss of animal life and contamination of the environment.

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[9] *http//wikipedia.ok.kui.legal.com.html*, [accessed on 17-07-2009].

Therefore, the research on the law of the sea or maritime law focusing attention on resources of sea as common heritage of mankind has become necessary. This will necessitate examinations of various maritime laws, rules and regulations in existence both in Iraq and India to find out existing loopholes and more importantly to suggest measure of sealing them to facilitate smooth running of maritime business activities.

Moreover, the research on maritime laws both in Iraq and India will try to address problems of conservation, pollution and equitable distribution of valuable resources of the sea.

D. JUSTIFICATION OR REASONS FOR SELECTION OF PRESENT TOPIC FOR RESEARCH:

Both Iraq and India are blessed with coastline which has provided golden opportunity to reap the benefit of using sea as a medium for promoting commerce and to be in touch with the outside world at a lesser cost. At the same time, for both the countries there is enormous maritime responsibility. The security and economic interests of these countries are also very closely linked with the maritime environs. Moreover, the natural disasters occurring in the Indian ocean[10] region often compel maritime agencies of these countries to undergo the litmus test in providing succour to the disaster stricken population at home and in their respective neighbourhood.

In addition, seas are vast reservoirs of resources both living and non-living. Sea-beds contain rich minerals in abundant quantity[11] which, at present, has become possible to explore and exploit to a great extent as a result of development in science and technology.

Considering the importance of seas in case of Iraq and India and keeping in view the fact that there is dearth of laws governing various aspects in

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[10] "Maritime Practises in India", *http://lexusnexus.net/marine/memo57.htl*, [accessed on 16th July 2009].
[11] *Supra* note 4 at 124, 125.

maritime in both the countries with a degree of difference the researcher has chosen this topic for research.

Further justification is, whatever little laws these countries have they are archaic and moth eaten as they were enacted during colonial regime. Hence, it is futile for the judiciary today to search for answers in them for the complicated questions posed by modern international trade. The judges, in such circumstances[12], have to inevitably embark on the uncharted seas with a few common law judgements as guide posts.

Major changes in the law of the sea are expected due to the changing perception on various issues. Question regarding how the community ought to be allowed to appropriate limitless resources of the sea for common good has to be addressed by law alone. Further, the earlier concept of the freedom of the high seas has been modified. In the past, the trend was to "assert ever greater claims over the high seas" which has now moved towards proclaiming a 'common heritage of mankind' regime over the seabed of the high seas[13].

In view of the above, the researcher is justified and has adequate reasons to research over this area of law.

E. REVIEW OF LITERATURE:

Without review of literature no any legal or social research can progress. It is of course "best to find out what is already known about a question before trying to answer it".

A literature review is both a summary and explanation of the complete and current state of knowledge on a limited topic as found in academic books, journal articles, *etc*. The main purpose behind such review is to:

- give readers easy access to research on a particular topic by selecting high quality articles or studies that are relevant, meaningful, important and valid and summarizing them into one complete report;

[12] *Liverpool and London Association v. M.V. Sea Success*.
[13] *Supra* note 1 at 491.

- provide an excellent starting point for researchers beginning to do research in a new area by forcing them to summarize, evaluate, and compare original research in that specific area;
- ensure that researchers do not duplicate work that has already been done;
- provide clues as to where future research is heading or recommend areas on which to focus;
- identify inconsistencies, gaps and contradictions in the literature;
- provide a constructive analysis of the methodologies and approaches of other researchers, *etc*.[14]

As the present research revolves around various aspects that fall within the purview of maritime laws of Iraq and India the survey of literature subsumes the literary work undertaken in both the countries by law experts. More importantly, no laws can be researched over in isolation because of its inter-dependence. Therefore, in the present research the primary data which compromise of International Conventions, Treaties, Declarations[15], Reports, documents, relevant Constitutional provisions of both India and Iraq, Statutory provisions[16], Rules and Judicial decisions of both countries on maritime along with many other inter-related materials is studied intensely.

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[14] "Writing a literature Review", *http://www.lib.uoguelph.ca/assistance/writing_services/resources/components/documents/lit_review.pdf,* [accessed on 26th June 2013].

[15] For *e.g.,* the *United Nations Convention on the Law of the Sea*, 1982; the *Convention on Limitation of Liability for Maritime Claims*, 1976; the *International Convention for the Safety of Life at Sea*, 1974; the *Maritime Labour Convention*, 2006; the *Convention on the Suppression of Unlawful Acts against the Safety of Maritime Navigation*, 1988; the *Marine Pollution Treaty*, 1973; the *Universal Declaration of Human Rights*, 1948, *etc*.

[16] For e.g., the *Iraqi Law of Carriage (Transportation)* No.80 of 1983; the *Iraqi Marine Insurance Act*, 1999; the *Delimiting Iraqi Territorial Waters Act*, Law No. 71 of 1958; *Merchant Marine Act*, 2002; the *Indian Merchant Shipping Act*, 1958; the *Indian Carriage of Goods by Sea Act*, 1925; the *Indian Bills of Lading Act*, 1856; the *Multimodal Transportation of Goods Act*, 1993; the *Major Port Trusts Act*, 1963; the *Marine Insurance Act*, 1963; the *Contract Act*, 1872; the *Sale of Goods Act*, 1930; the *Evidence Act*, 1872; the *Indian Penal Code*, 1860; the *Civil Procedure Code*, 1908; the *Criminal Procedure Code*, 1973; the *Maritime Zones of India (Regulation of Fishery by Foreign Vessels) Act*, 1981; the *Safety of Maritime Navigation and Fixed Platform on Continental Shelf Act*, 2002; the *Territorial Waters Continental Shelf – Exclusive Economic Zone and Other Maritime Zones Act*, 1976, *etc.*

This apart, the researcher has also laid his hands upon the secondary source like for *e.g.*, many commentaries authored by celebrated luminaries *i.e.*, Thomas J. Schoenbaum and A.N.Yiannopoulos[17], Robert D. Benedict[18], Khalilieh Hassan Salih[19], Tai Emily Sohmer[20], James Reddie[21], Proshanto K. Mukherjee[22], David W. Steel and Francis D. Rose[23], Christopher Hill[24], Edgar Gold[25], Victor Prescott and Clive Schofield[26], F. R. Sanborn[27], *etc.*, while writing the *First* Chapter that deals mainly with historical development in the area of maritime law at international law at international level.

For interpreting and analysing certain basic concepts which are often used under maritime law like for *e.g.*, Base likes, Internal Water and Territorial sea, Contagious Zone, Continental Shelf, Exclusive Economic Zone, High Seas, *etc.*, in the *Second* Chapter, the researcher has extensively relied on commentaries authored by E. Benedict[28], T. Carver[29], R. G. Marsden[30], Robin Rolf Churchill[31], Misra R. N.,[32] M. H. Abrams,[33] Victor Prescott and Clive Schofield,[34] *etc.*

The international laws and the Constitution are the basic source of all other laws both in Iraq and India. In this regard, Conventions, Treaties, Constitutions of both Iraq and India *etc.*, have been reviewed to write Chapter

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[17] Thomas J. Schoenbaum and A.N.Yiannopoulos, *Admiralty and Maritime Law, Cases and Materials* 1, Charlottesville, Va., 1984.
[18] Robert D. Benedict, *The Historical Position of the Rhodian Law*, (Yale Law, 1909).
[19] Khalilieh Hassan Salih , *Islamic Maritime Law: An Introduction,* (1988).
[20] Tai Emily Sohmer, *Admiralty and Maritime Laws in the Mediterranean Sea,* (2007).
[21] James Reddie, *Historical view of the Law of Maritime Commerce* , (William Blackwood & Sons, Edinburgh and London, 1987).
[22] Proshanto K. Mukherjee, *Maritime Legislation*, (Malmo: WMU Publications, 2002).
[23] David W. Steel and Francis D. Rose, *Kennedy's Law of Salvage*, 5th edn., (London: Stevens and Co., 1985).
[24] Christopher Hill, *Maritime Law*, 4th edn., (Lloyd's of London Press Ltd., 1995).
[25] Edgar Gold, *Maritime Transport: The Evolution of International Marine Policy and Shipping Law*, (Toronto: Lexington Books, 1981).
[26] Victor Prescott and Clive Schofield, the *Maritime Boundaries of the World,* (1999).
[27] F. R. Sanborn, *Origins of the Early English Maritime and Commercial Law* 23, (Professional Books Ltd., Milton Park, Abingdon, Oxon, Reprint 1989).
[28] E. Benedict, *The Law of American Admiralty*, Vol. 1–4 , 6th edn., (Knauth Publishers, 1940).
[29] T. Carver, *Carriage by Sea,* (12th ed.n, Colinvaux Publishers, 1971).
[30] R. G. Marsden, *The Law of Collisions at Sea*, 11th edn., (1961).
[31] Robin Rolf Churchill, *The Law of the Sea* 43, 2nd edn., (United Kingdom: Manchester University Press, 1988).
[32] Misra R. N., *Indian Ocean and Indian Security* 101, 1st edn., (Delhi: Mittal Publications, 1986).
[33] M. H. Abrams, *A Glossary of Geographical Terms* 229, (1975).
[34] Victor Prescott and Clive Schofield, *The Maritime Boundaries of the World,* (1987).

Three and *Four* of the doctoral thesis that deals with international laws and Constitutional provisions relating to maritime law both in Iraq and India respectively.

The domestic laws both in Iraq and India are also subjected to review as they are the quittances of Chapter *Five* and *Six* of the doctoral thesis. Moreover, Articles from various law journals of various countries, newspaper clippings, information from websites on internet *etc.*, have also been referred to in this context. In addition, the work done in the area of maritime by various international institutions and agencies is also considered as has been expansively enlisted in the bibliography.

F. HYPOTHESIS:

A hypothesis is generally something more than a wild guess but less than a well-established theory. It is a tentative theory about the natural world; a concept that is not yet verified but that if true would explain certain facts or phenomena[35].

According to Anwarul Yaqin, formulation of hypothesis is generally an essential aspect in any social-legal research.[36] By and large, the doctrinal research method is followed in the legal research where formulation of simple questions to guide the research can replace the hypothesis[37].

The present research is *prima facie* an exploratory by nature where existing legal provisions pertaining to Iraq and Indian maritime laws in the light of relevant judicial responses will be discussed thread bare. More importantly, the International Law requirements on this aspect will also be an inseparable part of this research.

The hypotheses that have been formulated are as follows:

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[35] "Hypothesis", *http://dictionary.kids.net.au/word/hypothesis*, [accessed on 27th June 2013].
[36] Anwarul Yaqin, *Legal Research and Writing Methods* 29, Nagpur: Lexis Nexis Butterworths Wadhwa, 2008.
[37] William G. Zilmud, *Business Research Methods* 92, 6th edn., (Ohio: South Western, 2000).

- Neither the maritime law of India nor of Iraq can be considered as a self contained and all pervasive in the present state. Because this area of law despite of the fact that major chunk of international commerce is carried on through sea route in both the democracies is far from satisfaction. Even the judiciary in case of India is left high and dry[38] when presented with cases that fall under maritime law.
- As there is dearth of effective laws covering all aspects involved in maritime the Courts have been or compelled to rely upon the International Conventions and Treaties where India has neither ratified nor a signatory. Iraq is comparatively in a better position as far as maritime law is concerned. Still, all is not well even there. There is need for a serious reconsideration by the law makers, in both the countries keeping in mind the ever increasing velocity of commerce and development of science and technology that is facilitating deep sea-bed mining to reap the benefits for the betterment of mankind.

The above hypotheses is put to test in the light of data collected through both primary and secondary sources the findings of which would provide all the required logistic for conducting this test in the concluding part of this thesis.

G. SCOPE OF THE PRESENT RESEARCH:

The present research is sea centric and it is said, oceans are the very foundation of life and in fact the life itself arose from the oceans[39]. Hence, the laws governing oceans/seas have immense importance in human life in this civilised society. However, any research without definite demarcations and delimitations that define the scope of the work would be like a wild goose chase. According to K. Punch drawing of boundaries around the research study

[38] *Supra* note 9.
[39] Michael Daiches, *http://www.un.org/Depts/los/oceans foundations.htm*, [accessed on 16th July 2009].

and pointing clearly what is in and what is out of the purview of research is quite crucial[40].

In the present research, as the researcher being an Iraqi national studying in India is formidably well acquainted with the problems faced in dealing with maritime transactions focuses upon the critical evaluation of the laws governing this area in both the countries in view of the fact that both the democracies are ill equipped in this area of law.

To begin with, a brief history behind the evolution of maritime laws in Iraq and India specifically and world over generally will be brought within the scope of present study along with an elaborate analysis of certain key terminologies used in law governing Admiralty. Seas are all pervading that require laws having universal base. Hence, the International law and its Conventions, Treaties, *etc.,* bearing upon the present topic have been robed within the scope of this research.

It is universally accepted that in any democracy the Constitution- a *supreme lex*, whether written or unwritten is the foundation based on which other laws are drafted. Hence, the relevant Constitutional provisions along with judicial decisions that provide such support in respect of Maritime Law of both Iraq and India are brought within the scope of the present work.

For better understanding of the legal framework of Maritime in Iraq and India relevant provisions of several legislations like for *e.g., Territorial Waters, Continental Shelf, Exclusive Economic Zone and other Maritime Zones Act*, 1976, *The Iraq Ports Act*, 1948 and several other Statutes and Rules along with their judicial interpretation will be relied upon for both the countries.

Apart from the above, other interrelated provisions of criminal laws, tort laws covering maritime crimes and torts will also form the part of this thesis.

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[40] Keith F. Punch, *Introduction to Social Research: Quantitative and Qualitative Approaches*, (London: Sage Publications, 1998).

H. METHODOLOGY ADOPTED FOR COLLECTION OF DATA FOR THE PRESENT RESEARCH:

The success of any research including legal research depends to a great extent on a good knowledge of certain basic principles and methods used to carry out the task. The object behind the present research is to explore the provisions of laws governing maritime in international as well as domestic laws and relevant judicial decisions of Iraq and India specifically and some other countries having coastline in general. It is important to find out whether the existing laws are self contained and all pervasive in view of the fact that both countries having coastline and huge chunk of commerce is being carried out through sea.

This research is basically a doctrinal research dealing with data collected from primary sources like for *e.g.,* International Conventions, Recommendations, Treaties, Declarations, Documents, Reports, Constitutional Provisions of Iraq and India dealing with Maritime and special Legislations covering important aspects of admiralty jurisdiction along with relevant judicial verdicts of both National and International Courts. This apart, even the secondary sources like recognized commentaries written by legal luminaries, Articles from Journals of India, Iraq and other countries available, articles from websites on internet, book reviews, newspapers, periodicals *etc.,* have also been minutely referred by the researcher.

I. SCHEME OF THE DOCTORAL THESIS:

The present research work contains in all seven Chapters excluding the 'Introduction' A brief outline of issues being dealt with in various Chapters of the Thesis is drawn hereunder:

The "introductory" part of the thesis comprises of statement of the research problem and its significance, reasons behind selection of the said researchable topic, its scope and underlying justifications for choosing this topic for research. Moreover, the literature review exhaustively undertaken is also

stated in this part of the thesis. In addition, the methodology adopted for the collection of required relevant data has also been briefly discussed. The last part provides the scheme of the doctoral thesis.

In the *First Chapter* of the doctoral thesis, the historical development in the area of maritime law at International level is incorporated. More importantly, special attention is focused upon the development that has taken place in maritime law both in Iraq and India in the past.

The *Second Chapter* compromises of interpretation and analysis of certain basic concepts which are often used under Maritime Law like for *e.g.*, Base lines, Internal Water and Territorial sea, Contiguous Zone, Continental Shelf, Exclusive Economic Zone, High Seas, *etc*. This will be a good base for the succeeding Chapters of the doctoral thesis.

The *Third* chapter contains the discussion on international law relating to Maritime. Here important International Conventions, Treaties, Declarations, Documents, Reports, *et.al.*, have been comprehensively analysed and criticised at the same time. The researcher has incorporated a number of suggestions that will plug the loopholes in the existing International Conventions, Treaties, *etc.*, in order to ensure smooth functioning of maritime business and other activities.

In the *Fourth Chapter* all the relevant provisions of the Constitutions of Iraq and India that prompted for legislating in area of maritime have been subjected to interpretation in the light of judicial decisions. Whether there is need to amend such Constitutional provisions to bring them into conformity with the changing times is addressed in this Chapter.

The *Fifth Chapter* deals with statutory enactments and their judicial interpretations pertaining to maritime laws in Iraq wherein all the ambiguities found and brought before the judiciary have been critically assessed.

In the *Sixth Chapter* Indian laws governing maritime have been subjected to scrutiny in the light of landmark judicial verdicts. An attempt has been made

by the researcher to identify the loopholes in the existing laws and what steps the legislature ought to take have been suggested.

In the *Final Chapter* of the doctoral thesis, conclusions are drawn from the study based on which some suggestions for effectuating amendments wherever needed for making laws governing maritime affairs in Iraq and India more effective are incorporated.

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